ARBITRATION AS A CONDITION PRECEDENT.

ON the question of the validity and effect of a provision in a contract making arbitration a condition precedent to liability, great confusion and difference of opinion have arisen, chiefly through the promulgation of two irreconcilable principles of decision and the failure of the courts in many jurisdictions to meet the issue and clearly adopt and consistently follow one principle or the other. The primary purpose of this article is, by bringing the cases together, to show the uncertainty which exists, afford an opportunity for a comparison of the two doctrines, and make plain the necessity of a clear statement and steadfast following of one principle or the other. The final statement by the writer of his own views will not, it is hoped, interfere with the first object of this article as thus outlined.

In Avery *v.* Scott,[1] action was brought on policies of insurance, in which the following provisions were incorporated: —

"That the sum to be paid by this association to any suffering member, for any loss or damage, shall in the first instance be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society. And if a difference shall arise between the committee and any suffering member, relative to the settling any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another. And if the committee refuse for fourteen days to make such selection, the suffering member shall select two, and in either case the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute, according to the rules and customs of the club, to be proved on oath by the secretary. . . . And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the state-

[1] 8 Exch. 497 (1853).

ment begun *de novo*. Provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association) that no member who refuses to accept the amount of any loss as settled by the committee, hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any action or suit."

The plaintiff brought suit without having referred his claim to arbitrators. The case was finally disposed of in the House of Lords, in 1856.[1]

In the Exchequer, judgment was rendered for the plaintiff. On writ of error the judgment was reversed in the Exchequer Chamber,[2] and in the House of Lords, also, judgment was given for the original defendant, but on much broader grounds than in the Exchequer Chamber. There is a clear issue between the Exchequer Chamber and the House of Lords as to the principle which should govern the decision. Coleridge, J., wrote the opinion of the court in the Exchequer Chamber, and succinctly expressed the governing principle of the court's decision in these words: —

"There is no dispute as to the principle. Both sides admit that it is not unlawful for parties to agree to impose a condition precedent *with respect to the mode of settling the amount of damage, or the time for paying it, or any matters of that kind, which do not go to the root of action.* On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported. The only question is, whether this case falls within the one or the other description."

Addressing himself to this question, Coleridge gives a narrow interpretation to the agreement, construing it as giving to the arbitrators the determination not of the entire question of liability, but only of the question of damage: "It is like an adjustment, where some damage is admitted, and the only question is as to the amount." Thus Coleridge brings the agreement within his rule of a condition precedent with respect to the mode of settling a matter "of a kind which does not go to the root of the action."

[1] Scott *v.* Avery, 5 H. L. Cas. 811. [2] 8 Exch. 497.

In the House of Lords a different view is taken. The opinions, were delivered by the Lord Chancellor and Lord Campbell, Lord Brougham concurring.

The Lord Chancellor: —

"If, in consideration of a sum of money paid to me by A. B., I agree with him that, in case J. S. should decide that A. B. had fulfilled certain conditions and had sustained certain damage, and J. S. should make his award accordingly, I would pay to A. B. the sum so ascertained and awarded, no right of action would exist until J. S. had made his award.

"*I do not go into that question, therefore, whether in this case, according to the true construction of the contract, the amount of damage alone is to be ascertained, because, in my view of the case, the principle goes much farther.*[1] It appears to me perfectly clear that, until the award was made, no right of action accrued, and consequently the judgment of the court below, reversing the judgment of the Court of Exchequer, and allowing the plea, was a perfectly correct judgment."

Lord Campbell: —

"In the first place, I think that the contract between the shipowner and the underwriters in this case is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and upon a deliberate view of the policy, I am of opinion that it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured.

"That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? . . . It is contended that it is against public policy; that is rather a dangerous ground to go upon. . . . Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract. Take the case of an insurance club, of which there are many in the North of England. . . . Is there anything contrary to public policy in saying that the Company shall not be harassed by actions the costs of which might be ruinous, but that any dispute that

[1] The Italics are the writer's.

arises shall be referred to a domestic tribunal, which may speedily and economically determine the dispute? I can see not the slightest ill consequence that can flow from such an agreement, and I can see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract.

"Then, my Lords, when we come to the decided cases, if there had been any decision which had not been reviewed by your Lordships, which adjudged such a contract to be illegal, I should ask your Lordships to reverse it; for it would seem to me really to stand on no principle whatsoever. It probably originated in the contests of the different courts in ancient times, for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction. . . . But I am glad to think that there is no case that I am aware of that will be overturned by your Lordships' affirming the judgment now in dispute."

It would seem as if this language of the House of Lords in Scott *v.* Avery was sufficiently clear in repudiation of the doctrine that a condition precedent of arbitration is void if it goes to the entire question of liability. But if any reiteration of the broad doctrine of the Lord Chancellor and Lord Campbell in Scott *v.* Avery were needed to make that doctrine undisputed law in England, it is to be found in Collins *v.* Locke[1] and Spackman *v.* Plumstead Board of Works.[2] In the former case, Sir Montague E. Smith, delivering the judgment of their Lordships, says: —

"The question so raised is, whether the general arbitration clause affords an answer to the action, there having been no arbitration and no award under it.

"Since the case of Scott *v.* Avery, in the House of Lords, the contention that such a clause is bad as an attempt to oust the courts of jurisdiction, may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract, and the intention of the parties to be collected from its language."

In the case of Spackman *v.* Plumstead Board of Works, Earl of Selborne, L. C., in the course of his opinion, speaking of Scott *v.* Avery, says:

"In Scott *v.* Avery the question had to be considered upon the general rule of law that people could not by contract oust the jurisdiction of

[1] 4 App. Cas. 674 (1879). [2] 10 App. Cas. 229 (1885).

courts of justice, on which had been founded a series of decisions, independent of course of recent statutes, as to the extent to which the courts would or would not enforce agreements to refer questions capable of being litigated in the courts of arbitration. The court had to determine whether that principle was applicable to a case in which it was part of the contract itself that the right of action, so to say, before it could arise, was to be ascertained by the decision of arbitrators; in which the right itself, the constitution of the right, was not to be perfect and absolute under the contract until arbitrators had decided something. The court held that to be perfectly good, and that in that case until such a decision had been made, no right upon which an action could be founded arose."

The doctrine of Coleridge, J., that an agreement between parties which gives to arbitrators the determination of the whole question of liability is void, even as a condition precedent, has however shown remarkable vitality. Even in England we find Brett, J., almost twenty years after the final decision in Scott *v.* Avery, in Edwards *v.* Aberayron Mut. Ship Ins. Soc.,[1] contending that Scott *v.* Avery did not decide that a condition is good which places in the hands of arbitrators the determination not merely of some particular point, as, for instance, the amount of the damage, but the whole question of liability. He therefore held that such a condition was bad as ousting the courts of their jurisdiction, and that the plaintiff's action would lie. Kelly, C. B., arrived at the same result, chiefly on the grounds stated by Brett, J. The decision in the case was in the plaintiff's favor, but Amphlett, B., whose opinion turned the scale, put his decision on quite a different ground from that taken by Brett, and on the question of the validity of the condition precedent was opposed to Brett and Kelly, and entirely in accord with Pollock and Archibald, and the three Judges of the Queen's Bench, Blackburn, Mellor, and Lush, who in that court had unanimously found for the defendant.

Edwards *v.* Aberayron Mut. Ship Ins. Soc. was decided before the broad doctrine of Lord Campbell in Scott *v.* Avery had been reiterated in Collins *v.* Locke and in Spackman *v.* Plumstead Board of Works. The extent of the decision in Scott *v.* Avery had, however, been fully recognized in the Exchequer Chamber in the cases of Horton *v.* Sayer,[2] with Pollock, Martin, Bramwell, and Watson sitting, and in Tredwen *v.* Holman,[3] with Bramwell, Martin and

[1] L. R. 1 Q. B. D. 563 (1876).
[2] 4 H. & N. 643, decided in 1859.
[3] 1 H. & C. 72.

Wilde sitting. In Dawson *et al. v.* Fitzgerald,[1] Jessel, M. R., says as to Scott *v.* Avery: —

"I take the law as settled by the highest authority — the House of Lords — to be this. There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring or to apply under § 11 of the Common Law Procedure Act, 1854, to stay the action till there has been arbitration."

In the case of the London Tramways Co., Limited, Appellants, Bailey, Respondent,[2] decided one year later than Edwards *v.* Aberayron Mut. Ship Ins. Soc., and in the same court, Mellor, J. says: —

"If two persons choose to agree that neither of them shall have any right of action under an agreement until a third person has given his decision upon the matter in question, as in the case of a wager, etc., the agreement is binding. It is quite reasonable that people should endeavor as far as possible to avoid the necessity of having recourse to courts of law."

As opposed to the doctrine so forcibly expressed in the House of Lords in Scott *v.* Avery, and clearly recognized in the later cases, the opinions of Brett and Kelly in Edwards *v.* Aberayron Mut. Ship Ins. Soc. cannot be regarded otherwise than as sporadic and as affording no reasonable ground for the statement of Field, C. J., in White *v.* Middlesex R. R. Co.,[3] that "Scott *v.* Avery, 5 H. L. Cases, 811, left it uncertain whether, if in a contract the agreement to submit to arbitration is a condition precedent to maintaining the action, and includes all disputes which may arise under the contract, and is not confined to questions which affect the amount of damages, it is or is not void." But while it cannot fairly be said that it is left uncertain in England whether such a condition precedent is void, it may well be said to be left uncertain in most jurisdictions in the United States.

In White *v.* Middlesex R. R. Co., *supra*, Field, C. J., says: —

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[1] L. R. 1 Ex. Div. 257 (1876).

[2] L. R. 3 Q. B. D. 217.

[3] 135 Mass. 216.

"The inclination of this court has been to regard such an agreement as void," citing authorities.[1]

"If such an agreement in a contract is not void as contrary to the policy of the law, the whole doctrine amounts to this, that the courts will not specifically enforce the agreement, but will treat it as valid, and as a condition precedent, or as an independent stipulation, according to the construction given to the contract."

What Field, C. J., calls "the inclination of this court" seems to be strengthened in subsequent cases in Massachusetts, though the issue does not seem to be fairly presented and met in any case. The court has shown a strong tendency to go no further than the decision of the particular case has required, following the lead of Chief Justice Chapman, who in Hood *v.* Hartshorn[2] disposed of the case as follows: —

"The present case comes within the principle stated by Coleridge, J., in Avery *v.* Scott, 8 Exch. 500, that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damages, or the time of paying it, or any matters of that kind which do not go to the root of the action."

See Reed *v.* Washington Ins. Co.,[3] and Hutchinson *v.* Liverpool, etc. Ins. Co.[4] In the latter case Morton, J., says: —

"No question is made that the conditions in regard to submitting the amount of the loss to arbitration, and not bringing suit till after an award, are such as may be properly incorporated in a policy. They relate to the manner of arriving at the amount of the loss, leaving the question of the liability of the company untouched, and to be settled by application to the courts, or in such other way as the parties may agree. Such conditions in a policy have been held to be valid. Hood *v.* Hartshorn, 100 Mass. 117; Scott *v.* Avery, 5 H. L. Cas. 811."

See also Haley *v.* Bellamy,[5] and Thorndike *v.* Wells Mem. Assoc.[6]

In Maine the court says, in Cushing *v.* Babcock[7]: —

"Arbitration is a mode of adjusting disputes favored by the law. . . . Arbitrators are judges chosen by the parties themselves, and, at common

[1] Cobb *v.* New England Ins. Co., 6 Gray, 192; Rowe *v.* Williams, 97 Mass. 163; Wood *v.* Humphrey, 114 Mass. 185; Pearl *v.* Harris, 121 Mass. 390; Vass *v.* Wales, 129 Mass. 38. See also Trott *v.* City Ins. Co., 1 Cliff. 439; Mansfield *v.* Doolin, I. R. 4 C. L. 17.

[2] 100 Mass. 117.

[3] 138 Mass. 572.

[4] 153 Mass. 143.

[5] 137 Mass. 357.

[6] 146 Mass. 619.

[7] 38 Me. 452.

law, their awards are not examinable, except on the ground of corruption, gross partiality, or evident excess of power. . . . It is competent for parties to liquidate, by agreement or arbitration, the amount for which judgment shall be entered up in actions pending in court."

In view of the benign consideration for arbitration expressed in Cushing *v.* Babcock, it might be thought that the court would see nothing contrary to public policy in a contract making the award of arbiters a condition precedent to action; but the court in later cases has squarely adopted the doctrine of Coleridge, J.[1] In Dugan *v.* Thomas the court says: —

"Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. But men cannot be compelled even by their own agreements to mutually agree upon arbiters whose duties would, as in this case, go to the root of the principal claim or cause of action, and oust the courts of their jurisdiction."

In view of the above decisions, Perry *v.* Cobb,[2] in which the doctrine of the prior cases is expressly affirmed, is interesting. The plaintiff was a member of the Knox Lime Insurance Association, the by-laws of which provided as follows: —

"Article 6th. — If a shipper receive notice of a cargo in trouble he is to notify the secretary or one of the committee in writing, but he, the shipper, to take full charge of the interest, and act for the best interests of all concerned with the advice of the committee or their agent, and when closed, to submit the result to the committee, and they are to determine the amount due, if any, and pay the same at their first regular meeting after the claim for loss is presented, unless the Association has insufficient funds, in which case thirty days time for payment shall be granted. An appeal may be made to a majority of two thirds of the votes of the Association, whose decision shall be final."

"Article 11th. — No suit in law shall be begun or maintained by one or more members against any other member or members of this Association, on account, or for any claim growing out of the same, except for the collection of the demand notes."

The plaintiff, having suffered damage to a cargo of lime, submitted his claim to the committee, and afterwards on appeal to the association. Both decisions were adverse to him. Thereupon he

[1] Stephenson *v.* Piscataqua F. & M Ins. Co., 54 Me. 55; Buck *v.* Rich, 78 Me. 431; and Dugan *v.* Thomas, 79 Me. 221.

[2] 88 Me. 435 (1896).

filed a bill in equity against the members of the association, claiming the right to test his claim to indemnity in the courts *de novo*. The court disposed of Article 11th in summary fashion by saying that this was not a suit in law but a suit in equity. Dealing with the Sixth Article, the court says that it is not an agreement for arbitration, inasmuch as the parties by whom claims are to be passed upon are not disinterested parties but the contracting parties themselves; that the provision for submitting claims to the committee and on appeal to the association is an agreement as to mode of procedure among the members of the association *inter sese* and is binding on the members. The court does not, however, hold binding the provision that such decision shall be final, but, after saying that "in this proceeding the decision was in the nature of an award," treats of its effect as follows: —

"Why, then, should not this method, agreed to by the associates, have such force and effect upon a court of equity as the fairness of the investigation and deliberation of the decision indicate would be safe, work justice, and save expensive litigation to the parties, as it was originally intended that it should do? No good reason suggests itself, and some of the rules touching awards may safely apply. The opinion of the court in Burchell *v.* Marsh, 17 How. 344, upon a bill in equity to set aside an award of arbitrators, is very instructive. It holds that an honest decision upon a fair hearing should stand, although the court feels that it could have arrived at a better result; for otherwise it would be the 'commencement, not the end of litigation.' A judgment of Lord Thurlow is cited in confirmation of the doctrine. Knox *v.* Symmonds, 1 Ves. Jr. 369.

"In this cause the decision of the associates is not an award in the strict sense, but a procedure in an equitable controversy between joint associates, that determines their rights *inter sese*, and it should bind them, except for cause shown to the contrary. They are all interested parties, and that fact and the evidence adduced may show a denial of equitable relief that should be given, and it may show the reverse. At any rate, the whole cause may be heard anew to see if any such error or mistake intervenes as should change the result. The relief prayed for is equitable, and will be granted or withheld as sound discretion may demand."

In trying to get at the principle of this decision, the point that this is an agreement *inter sese*, on which the court seems to put much stress, can, it would seem, be eliminated in so far as it is relied upon as distinguishing this case from the ordinary case; for any arrangement which contracting parties make for the determina-

tion of a question of obligation between them is an arrangement *inter sese*, and certainly the fact that they agree upon disinterested parties to pass upon the question does not make it any the less an arrangement *inter sese*, or afford any reason for giving the determination less force or effect. For instance, suppose the by-law in this case had been that a committee of five, chosen each year from the past members of the association, should constitute the body to which the appeal should lie, instead of the association, and that the decision of that committee should be final. It is difficult to see how the court could logically refuse to give to such a provision at least as much effect as they gave to the by-law providing for an appeal to the association. If that is so, if any principle is to be adduced from the decision, it is that where parties contract that they will pay such sum, if any, as may be determined by certain other parties to be due, such a provision is binding on the parties as a mode of procedure, and the finding will be given much the same effect as an award, being reviewable by a court of equity, but reversible only on proof of fraud or manifest error. It must, however, be admitted that such a conclusion is hardly reconcilable with the doctrine laid down by the Main court in the prior cases expressly reaffirmed in this case.

The situation in the United States courts is equally interesting. Fox *v.* The Railroad,[1] in the Third Circuit, was an action of contract on an agreement, in which it was provided: —

"And it is mutually agreed and distinctly understood that the decision of the chief engineer for the time being shall be final and conclusive in any dispute which may arise between the parties of this agreement relative to or touching the same; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy at law or otherwise by virtue of said covenant; so that the decision of the engineer shall, in the nature of an award be final and conclusive on the right and claims of the said parties; and the engineer being a stockholder of this company shall be no objection to his exercising the trusts and power herein granted to him."

The plaintiff sued without submitting his claim to the engineer, and it was held that he had no cause of action, the court holding that the decision of the engineer was a condition precedent. Discussing the doctrine that such conditions precedent are void, as

[1] 3 Wall. Jr., 243.

ousting the courts of their jurisdiction, the court, per Grier, J., says: —

"This obsolete dogma does not appear to have been received with approbation in Pennsylvania. In the case of The Monongahela Navigation Co. *v.* Fenlon, 4 Watts & Sergeant, 205, it was decided, etc. . . . That case governs the present, 'as to every dispute arising relative to or touching the agreement' declared on.

"Such a clause in contracts like those constantly made by corporations for great public improvements is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed, and not subjected to ingenious criticisms in order to support the jurisdiction of courts of law and encourage litigation." [1]

But in the case of Trott *v.* The City Ins. Co.,[2] in the First Circuit, the opposite result was reached, the court adopting the rule of Coleridge, J. It is remarkable, however, that in this case, although decided in 1860, neither counsel nor court seem to be aware of the House of Lords decision in Scott *v.* Avery, but cite and discuss only the decisions of the Exchequer and Exchequer Chamber.

In New York the question has been gone into very fully in the case of Pres't, etc. D. & H. Canal Co. *v.* Pa. Coal Co.[3]

The court says on the general question of agreements for arbitration:—

"It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction. The reason of the rule is by some traced to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced. An agreement of this character induced by fraud or overreaching, or entered into inadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance, or disregarded when set up as a defence to an action.

"But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and

[1] Compare also U. S. *v.* Robeson, 9 Pet. 319.

[2] 1 Clifford, 439.

[3] 50 N. Y. 250.

the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstance entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule, or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than to enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified."

In the case before the court the parties had agreed that, if a certain canal was enlarged, the defendant company should pay an extra toll to be determined by three arbitrators chosen in a specified way. The court held that under the agreement such determination by arbitrators was a condition precedent to any liability for extra toll, and until such arbitration no action would lie for extra toll. It is to be noted, however, that the rule of Coleridge, J., would cover this case on its facts, and that the court in the course of a very long and elaborate decision does not make it entirely clear whether it places the case on the broad ground of condition precedent irrespective of the question whether the arbitration does or does not go to the whole question of liability, or whether it considers itself limited to the narrower doctrine of Coleridge, J.

The Supreme Court of Pennsylvania very early took broad ground on the question of agreements for arbitration, holding in the case of Monongahela Navig. Co. *v.* Fenlon,[1] decided in 1842, that the following agreement was valid and binding on the parties: "It is also mutually agreed between the parties to these presents, that in any dispute which may arise between the contractor and the company, the decision of the engineer shall be obligatory

[1] 4 Watts & Serg. 205.

and conclusive, without further recourse or appeal."[1] In California, the tendency seems to be toward the doctrine of the House of Lords decision in Scott *v.* Avery.[2] In Wisconsin, the case of Hudson et al. *v.* McCartney[3] leaves the question in much the same way that it is left by the New York court in Pres't, etc. D. & H. Canal Co. *v.* Pa. Coal Co.

The last case to which the writer wishes to call attention is Calvin et al. *v.* The Provincial Ins. Co.[4] The defendant and another insurance company had insured a vessel which was sunk while being towed by the plaintiffs for her owners. An agreement was then entered into between the plaintiffs and the two companies, in which, after reciting that the liability for raising the vessel was undetermined, the plaintiffs undertook to raise her for a sum named, and it was agreed to submit to arbitration by whom such sum and the other expenses of repairing the vessel should be borne. The plaintiffs raised the vessel, and then sued the defendants on common counts for work and labor without any arbitration having been had. The case goes off in favor of the defendants on the ground of the form of action, but the court says as to the agreement: —

"There is not a word in this agreement by which the defendants admit liability for the raising or repairs, or contract that they will pay the plaintiffs anything until the question of their liability is decided. To found a claim upon the agreement, an award must be shown. It would be as reasonable to bring an action upon an arbitration bond conditioned to obey . . . an award, before the award is made, as to hold that on this agreement an action could be maintained under the circumstances."

The whole essence of the question under discussion in this article is contained in the few words of the court in this case. The sinking of the vessel gave rise to no liability of the plaintiffs to the defendants or *vice versa*, the only liability of either being to the owners of the vessel. Nor did the raising of the vessel of itself give rise to any liability on the part of the defendants to the plaintiffs. If the plaintiffs had raised her without any agreement on the part of the defendants, there would have been no claim of

[1] See also Faunce *v.* Burke, 16 Penn. St. 469; Snodgrass *v.* Gavit, 28 Penn. St. 221.

[2] Holmes *v.* Richet, 56 Cal. 307, and Saucelito L. & D. D. Co. *v.* C. U. A. Co., 66 Cal. 253.

[3] 33 Wis. 331.

[4] 27 Up. Can. Q. B. 403.

liability. The plaintiffs must rely on the express contract of the defendants, and by that contract the defendants agree to pay the plaintiffs only when two things have happened; first, the raising of the vessel; secondly, the making of an award by the arbitrators. This is no ousting of the courts of any jurisdiction. The plaintiffs may go into court on that contract when they choose, but, if they have not submitted the matter to arbitrators, the court, though it has jurisdiction of the contract, cannot give judgment, for the reason that the things stipulated as conditions precedent to liability on the express contract have not happened, and there is no ground of liability in implied contract. As is well put, it is like a suit brought on a bond conditioned to obey an award before the award is made.

Pollock, B., in Dawson *v.* Fitzgerald,[1] says, "it has been shown, not only by decisions, but by legislation of late years, that the same pious reverence is not felt for litigation in open court that was felt in old times." To hold a defendant liable to action on such an agreement as is set forth in Calvin *v.* The Provincial Ins. Co., without any performance or attempted performance of the condition precedent, would be to satisfy the demands of such pious reverence at the expense of justice. It may be that, if "two persons, whether in the same or a different deed from that which creates the liability, enter into a collateral and independent agreement to refer the matter upon which the liability arises to arbitration," such an agreement will not commend itself to the courts for specific enforcement, and will not therefore take away the right of action on the principal covenant. The refusal by the court to give specific effect to such an agreement is no encroachment on freedom of contract, especially if the right of an action at law for breach of the agreement is recognized, as it is in the opinion of Jessel, M. R., in Dawson *v.* Fitzgerald. It is with reference to such agreements that there arose "the unfortunate expression[2] that 'the jurisdiction of the court is ousted by the agreement of the parties.'" But where "the right itself is under the contract not to be perfect and absolute until the arbitrators have decided something," then there can in no sense properly be said to be an ousting of the jurisdiction of the courts, for the reason that, under the terms of the contract, until after the arbitration has taken place

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[1] L. R. 1 Ex. Div. 257.

[2] Bramwell, B., in Norton *v.* Sawyer, 4 H. & N. 643.

no cause of action has arisen from the jurisdiction of which the courts can be ousted. To disregard such a condition precedent is quite a different thing from the exercise of the court's discretion in the granting of specific relief. It is to remould the parties' agreement and to encroach grossly on their freedom of contract.

The ancient cases, as has been pointed out, do not involve in their result, though they may in their reasoning, any such encroachment on freedom of contract. In the light of the very general questioning and repudiation by modern jurists of the doctrine of the public policy on which those cases are based, it is submitted that courts which have not already passed on the question should hesitate long before applying that doctrine in a class of cases which are logically distinguishable, and where the application of the doctrine involves an anomalous violation of the principles of the law of contracts which was not involved in the ancient cases. Admitting some force in the ancient doctrine of public policy, the courts must, as in every case where public policy is alleged as a ground for departing from ordinary rules of law, weigh the alleged public policy considerations as against the evil involved in a legal anomaly. Some courts would undoubtedly say that it is on the whole better that parties should not rely on unjudicial minds to determine their rights. But it must be recognized that there are great and obvious advantages to the parties in avoiding litigation in court. Weighing all considerations, it is submitted that the possible evil of such a determination of rights is entirely overbalanced by the evil of holding a provision for such determination void as a condition precedent, involving as it does a serious violation of principles of law in imposing on the parties, as an express contract, a contract vitally different from that which they made.

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